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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-773

SCOTT HUDGENS, AN INDIVIDUAL,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,
Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONER.

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INTEREST OF THE AMICUS.*

1. The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in

*There have been lodged with the Clerk of the Court the written consents of the parties to the captioned proceeding to the filing of this *amicus brief*.

excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

2. The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.**

The question presented in the instant case is a matter of continuing importance to the Chamber. Briefly stated, that question is: under what circumstances must the constitutional right of private property yield to allow picketing when the underlying labor dispute does not originate on this property and does not concern the business operations or labor relations at that property of the property owner or any tenant.

This is an issue which is of particular concern to the Chamber and its members since any rule which may emerge will necessarily exert an enormous impact on those members' rights and, potentially, on their manner of doing business.

The Chamber is, by virtue of its interest in this area, in a position to urge views upon this Court which neither party has argued.

**E.g., *Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100, etc.* No. 73-1256; *N.L.R.B.* v. *Textron, Inc.*, ... U.S. ....., 85 LRRM 2945 (1974); *Geduldig* v. *Aiello, et al.*, ... U.S. ....., 8 F.E.P. Cases 97 (1974); *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213, 34 L. Ed. 2d 422 (1972); *Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970); *Sears Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U.S. 655 (1970); *Super Tire Engineering Co., et al.* v. *McCorkle, et al.*, ... U.S. ....., 85 LRRM 2913 (April, 1974); *N.L.R.B.* v. *Frank Visceglia and Vincent Visceglia t/a Peddie Buildings*, ... F. 2d ....., 86 LRRM 2541 (CA 3, 1974); *Scott Hudgens* v. *N.L.R.B.*, ... F. 2d ....., No. 73-3264 (CA 5, 1974). *Scott Hudgens* v. *Local 315 Retail and Wholesale Department Store Union*, 74-1032.

With respect to the wide-ranging impact of any decision which may be rendered here on the rights of the Chamber's members, it should be noted that shopping centers can be of practically any size ranging from a collection of large national retail operations to local, neighborhood centers with but a few small independent stores. In fact, the characteristics of a shopping center do not materially differ from other types of retail enterprises, such as discount houses or large department stores, which are not generally regarded as "shopping centers". The interest of the Chamber is thus predicated on the substantial consequences that any decision here may have for *all* methods of retail operation. Indeed the Chamber's concern extends beyond retail operations to even nonretail property such as was involved in *Peddie Buildings, supra*. The Chamber is also concerned about the impact on its members' legitimate business interests of the adoption of a requirement, sought by the Board, that by opening their property to business invitees they thereby necessarily become constitutionally obligated to permit their property to become a battlefield for a variety of controversial competing uses to the detriment of their businesses, without regard for the preservation of their own rights or the actual communication needs of others.

SUMMARY OF THE ARGUMENT.

This case presents a recurring question of significance to employers generally, due to the proliferation of shopping centers and the attempted use of this property by labor organizations and others for protest activities. Here this Court is asked to define when private property rights must yield and permit the intrusion of expressive or protest activity where the underlying labor dispute does not originate on the property and does not concern the business operations or labor relations of any facility at this property. Thus, while the pickets here sought access to Hudgens' center, a privately owned shopping center, to picket a retail outlet of Hudgens' tenant, Butler Shoe Co., the underlying

labor dispute originated at and concerned only the labor relations of Butler's nonretail warehouse which was *not* located on Hudgens' center.

Therefore, it may be said that the purpose of the intended picketing was but *indirectly* related to the business of the center. This Court has recognized the existence of such an indirect relationship in *Lloyd Corp.* v. *Tanner,* 407 U.S. at 564 (1972).

This case, then, concerns the accommodation to be made between the rights of property and expression when the purpose of the expressive activity is not directly related to the business of the private property.

This Court has considered the accommodation between these competing rights when the labor dispute originated on the shopping center and was, therefore, directly related to the business of the center. (*Logan Valley,* 390 U.S. 308, 1968.) This Court has also prohibited expressive activity from taking place on a private shopping center when the purpose of this activity was wholly unrelated to the center's business. (*Lloyd Corp.* v. *Tanner, supra.*)

The Chamber submits that a proper accommodation of the competing rights here in question requires initially a distinction between expressive activity that is directly related to the property's use and that which is indirectly related. In the former situation where the dispute originates on the property to be subjected to the protest, the property owner or his tenants can forestall or curtail this dispute by changing their mode of operation. In the latter situation, as here, where the dispute originates and is centered elsewhere, neither the property owner nor any tenant who will be subjected to the protest activity can effect the scope or duration of this activity by altering methods of operation. While the Chamber believes that in either situation expressive activity should be permitted to encroach on to private property only if alternative public forums are lacking, the Chamber submits that the proof concerning the absence of

alternative forums must be greater and more compelling in the situation where the purpose of the expressive activity is but indirectly related to the property's business. That is, since the users of the private property to be subjected to protest activity indirectly related to the property's purpose have no control over the duration or scope of this activity (except by excluding the protesters) there should be no occasion to open this property to such activity absent a conclusive demonstration of a compelling need due to the lack of alternative public forums.

Indeed, due to the particularly intimidatory effect of picketing, this Court should require strict and compelling proof by those who desire to picket on private property that alternative forums or alternative methods of communication are not adequate. Only after such a strict demonstration should private property be opened to consumer picketing, particularly where, as here, the underlying labor dispute did not originate on this property and was not directly related to the property's business.

The Chamber believes that this standard or rule appropriately balances the interests at issue in this proceeding and urges its adoption by this Court. An analysis of the record below utilizing the standard proposed by the Chamber demonstrates that the property owner, Hudgens, lawfully excluded the pickets from his property since these pickets did not demonstrate the lack of alternative public forums. The court below failed to distinguish between expressive activity that was directly related to the business of the property and activity that was but indirectly related and, accordingly, reached the decision that did not give due regard to private property rights. In addition, the court below erred by failing to recognize the intimidatory effect of picketing and that alternatives to direct picketing on private property do exist and should be employed especially where the purpose of the protest is indirectly related to the property's business.

ARGUMENT.

A. The Expressive Activity in This Cause Was But Indirectly Related to the Property's Business.

The Employer, Scott Hudgens, owns a sixty store retail shopping center which draws its customers from the metropolitan Atlanta area. This center consists of a single large building constructed around an enclosed mall and surrounded by a parking lot. Five driveway entrances lead into this parking lot. Hudgens has an abiding interest in the commercial success of the center's tenants since its rentals are based upon their gross sales. Among Hudgens' tenants is a retail outlet of Butler Shoe Company.

In January, 1971, nonretail employees of Butler employed at its warehouse that is not located on Hudgens' property engaged in a strike protesting the warehouse's failure to reach agreement on a contract with a union. In order to support this strike, the Union determined to picket Butler's retail outlets as well as its warehouse.[1] Accordingly, four warehouse employees arrived on Hudgens' property intending to picket at the entrances to Butler's retail outlet located in the center's mall. After a conversation with Hudgens' agent, the pickets left the center and filed unfair labor practice charges with the Labor Board.

As is apparent, while the Union was attempting to picket Butler's retail facility on the center's private property, the labor dispute did not originate on this property since it did not concern the manner in which Butler was operating its retail outlet at the center. Rather, the dispute originated at the Butler warehouse, concerned only those operations, and did not concern the labor relations of any Butler retail facility. Therefore, it may be said that the purpose of the intended picketing was but indirectly

1/ The Union picketed eight of Butler's retail locations in the Atlanta metropolitan area in an effort to reach the buying public of Greater Atlanta, and intended to picket Butler's retail operations on Hudgens Center.

related to the business of the center. This Court has recognized the existence of such an indirect relationship in *Lloyd Corp.* v. *Tanner, supra.*[2] Where this relationship exists, neither the center's owner nor any of his tenants can forestall or curtail picketing by altering their operational methods.

B. Expressive Activity Indirectly Related to Private Property's Business Should Be Allowed on This Property Only Upon Compelling Demonstration That Alternative Public Forums Are Absent.

1. A Test Derived from Logan and Lloyd Supports This Contention.

The specific issue is whether Hudgens violated the Labor Act (Sections 7 and 8(a)(1)) by forestalling this picketing. A broader and more significant issue concerns the accommodation to be made between property and expressive rights when the purpose of expressive activity is but indirectly related to the business of the private property involved. That is, in such a situation, when must property rights yield and permit expressive activity to occur on private property.

2. Moreover, in *Logan,* this Court stated at footnote 9, page 613:

> "The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which *that particular market was being operated.* We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was *not thus directly related* in its purpose to the use to which the shopping center property was being put." (emphasis added)

This Court's language "thus directly related" can only refer to the situation in *Logan* where the picketing was in regard to the manner in which a facility was being operated on the property where the picketing occurred. This view is endorsed by *Lloyd* which recognized that an indirect relationship may exist at a point in the decision immediately following a discussion of the direct relationship that existed in *Logan.* (page 564). It follows that this Court has distinguished between a direct and an indirect relationship and that the situation in this case involves at best the indirect relationship recognized by *Lloyd.*

This Court has reviewed related issues in *Logan*[3] and *Lloyd*. A consideration of these decisions is necessary in order to ascertain the circumstances that require property rights to yield to expressive rights. While a determination of these circumstances will not resolve the broad issue here, this determination is necessary to point the way to the answer. In *Logan* this Court found a direct relationship between the purpose of the protest activity and the business of the shopping center because the picketing was in regard to the manner in which a facility was being operated—that is, without a union—on the center's property where the picketing occurred.[4] This Court then considered the balance to be struck between property and expressive rights when such a direct relationship is found to exist. In *Lloyd*, by contrast, the propaganda activity conducted in the private shopping center was wholly unrelated to any purpose for which this property was being used. (407 U.S. at 564.) That is, the purpose of the expressive or protest activity in *Lloyd*—an anti-war protest—did not concern the manner in which any tenant of the center operated his business on the center's property or elsewhere. Consequently, this Court prohibited the exercise of this expressive activity on Lloyd's private center. This Court apparently recognized that while the picketed employer in *Logan* could in some measure forestall or curtail the picketing by altering his operational methods at the center, neither the center owner nor his tenants in *Lloyd* had control over the duration or extent of the protest; changing their business methods at any location where they operated would have no impact upon the anti-war protest.

While the instant case has factual parallels with *Lloyd*, rather than with *Logan*, it presents a situation different from each of these prior cases.[5] Thus, the dispute here, like that in *Lloyd*,

3. *Amalgamated Food Employees' Union, Local 590* v. *Logan Valley Plaza, Inc.*, 390 U.S. 308 (1968).

4. 391 U.S. at 320 footnote 9, and at 326. *Lloyd* reaffirmed this view. 407 U.S. at pages 552, 553, 560-561.

5. The Chamber believes that in its *Lloyd* decision, this Court addressed itself to the type of variables present in the instant cause. While *Lloyd* is a Fourteenth Amendment case, it therefore applies by analogy to the instant labor dispute. On the other hand, the analysis in a second line of cases dealing with communication and property rights and typified by *N.L.R.B.* v. *Babcock and Wilcox Co.* (351 U.S. 105 (1956)) and *N.L.R.B.* v. *Central Hardware Co.* (407 U.S. 539 (1972)) applies expressly to organization campaigns *only*. While these cases provide guidance in framing a rule to be applied in this cause, their principles are not strictly applicable to the facts herein.

concerned efforts to proselytize the public and did not originate on the center's private property or concern the manner in which any employer was operating on this property. This Court in *Lloyd* recognized the public could be reached by the use of mass media or public property and there was no need to intrude upon private property. Similarly, here where the buying public is the target of the Union's protest, mass media can effectively be employed. The retailers use this media to attract customers and it may effectively be used to discourage patronage. There is no need to picket on private property here any more than there was in *Lloyd*. However, the controversy here—unlike that in *Lloyd*—was concerned with the operations elsewhere of a center's tenant. Thus, while *Logan* and *Lloyd* represent points of departure, this Court has as yet formulated no rule to accommodate the rights of property and expression when the purpose of the expressive activity is *indirectly* related to the business of the property.

The formulation of such a rule begins with an examination of a test that is derived by blending *Logan* and *Lloyd*: private property becomes subject to protest or propaganda activity only when both of the following are satisfied: (a) the purpose of the propaganda or expressive activity is at least indirectly related to the business of the property, *and* (b) there exists no reasonably effective alternative means of communication to reach the intended audience.[6]

This test is stated in the conjunctive. Consequently, there is no need to reach (b)—the question of whether alternatives to

6. The court below realized the validity of this test or rule. See Part IV in the decision below. That court misapplied this rule by failing to distinguish between directly and indirectly related protest activity.

private property exist—unless there is first a showing that the purpose of the protest is at least indirectly related to the use to which the property is put.[7]

2. Proof of Absence of Alternative Forums Where the Purpose of Expressive Activity Is Indirectly Related to the Property's Business Must Be Greater Than That Required Where a Direct Relationship Is Present.

While the test derived from Logan—Lloyd supports the Chamber's position, it does not answer the broad issue posed by this case. The Chamber contends that once a relationship between protest activity and the property's use is found, resolution of this issue requires an examination of the quantum and type of proof required on the issue of alternative avenues of communication. The Chamber further contends that when considering the proof required on the issue of alternative forums, it is necessary to distinguish between situations where the protest activity is directly related to the property's purpose and those where there exists but an indirect relationship.[8] This case then requires a consideration of the question left open by *Lloyd* and *Logan*: to what extent must persons who desire to propagandize on private property first demonstrate that alternative avenues of communication do not exist when the purpose of their protest is *indirectly* related to the business of the property. The Chamber believes that the proof of the absence of alternative forums in this indirect relation situation must be greater than that required where the expressive activity is directly related to the business of the property.

7. This Court distinguished *Lloyd* from *Logan* by finding in *Lloyd* that adequate means existed to communicate with the public from nonprivate property. However, a fair reading of *Lloyd* requires the conclusion that where the First Amendment activity is *not* related to the use of the private property, this *fact alone* permits the denial of access to private property, including, e.g., shopping centers, and free standing stores and adjacent parking lots. The majority, in distinguishing *Logan*, stated that that case extended *Marsh* to a shopping center situation where the First Amendment activity "was related to the shopping center activities." This Court in *Lloyd* continued that it was not called upon in *Logan* to "consider whether respondents' property rights could, consistent with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center was put." (407 U.S. at 560.) That open question was answered in *Lloyd* where First Amendment activity was barred because it lacked such a relationship to the purpose of the property sought to be used. Moreover, the *Lloyd* dissent concluded that the majority viewed the case as presenting the issue of whether the owner of a shopping center could bar First Amendment activity which was not related to the purpose or use of the center. 407 U.S. at 577-578. In addition, the Oregon Supreme Court in *Lenrich Associates* v. *Heyda*, 504 P. 2d 112 (1972) interpreted *Lloyd* as holding that when First Amendment activity is not related to the use of private property catering to the public, the property owner may deny access to his property to those who would assert these First Amendment rights. While the *Lloyd* court did not overrule *Marsh*, 326 U.S. 501 (1946) where the speech activity was unrelated to the use of the property, this failure to overrule *Marsh* undoubtedly reflected a view that in the exceptional circumstances of a company-owned town, the "related" test need not be applied strictly. The court in *Lloyd* held that *Marsh* was not intended to apply to shopping center situations. 407 U.S. at 562. In all situations other than the "very special situation of a company-owned town," the *Lloyd-Logan* analysis applies when dealing with speech activity whether this activity is related to or unrelated to the use of the property.

In order to determine the breadth of property rights in this case and to demonstrate the validity of the Chamber's position, judicial precedents in related areas while not determinative should be consulted for their ability to provide guidance. Thus, while employees may have an abstract right to picket their employer wherever he is located,[9] this Court in *Lloyd* recognized that an employer's constitutionally protected property rights are equally valid and deserving of consideration.[10]

8. As stated, the court below failed to consider this necessary distinction. The arguments advanced herein apply whether the property is devoted to retail or nonretail use.

9. See *N.L.R.B.* v. *Local 810 Sheet Metals, etc.*, 460 F. 2d 1 (CA 2, 1962); *Local 761 Electrical Workers* v. *N.L.R.B.*, 366 U.S. 667, 672 (1961).

10. The property rights at stake here are not only the right to be free from trespass but also the right to do business without interference from those who would use private property to protest or propagandize.

The majority's decision in *Lloyd* clearly confers constitutional status to these private property rights and undertakes to weigh these

In addition, the rationale of this Court's organizational campaign decisions, *Babcock* and *Central Hardware*, provides guidance in resolving the issue here, since it demonstrates this Court's concern for property rights, though these cases involve situations where expressive activity is directly related to the business of the private property, and therefore, do not isolate the variables present here.[11] Thus, the instant matter concerns consumer picketing rights where the dispute, as demonstrated, is not directly related to the business of the property involved. By contrast, *Babcock* and *Central* were explicitly limited to organizational rights. Organizational campaigns involve efforts by a union to utilize private property to unionize employees working on that property. The labor disputes in these cases originate and

rights against the First Amendment rights of parties seeking to use private property as a forum:

> "* * * The Due Process Clauses of the Fifth and Fourteenth Amendments are also relevant to this case. They provide that 'no person shall . . . be deprived of life, liberty, or property, without due process of law.' There is the further proscription in the Fifth Amendment against the taking of 'private property . . . for public use, without just compensation.'"
>
> "We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy. But on the facts presented in this case, the answer is clear." 407 U.S. at 567; 570.

It is undisputed that shopping centers, while open to the business public, retain their character as private property. Thus, this Court in *Lloyd* acknowledged that while a shopping center is open to the public for business purposes, it does not lose its private character, "merely because the public is invited to use it for designated purposes . . . [t]he essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center." 407 U.S. at 569. The *Lloyd* court also stated that privately owned streets and walks in a shopping center are not the equivalent of municipally owned streets for speech activity purposes. 407 U.S. 565.

11. *N.L.R.B.* v. *Babcock and Wilcox Co.*, 351 U.S. 105 (1956); *N.L.R.B.* v. *Central Hardware Co.*, 407 U.S. 539 (1972).

are centered at the site of the union's propaganda activity. These disputes are directly related to the site's use because they concern the nonunion method by which an employer is operating on that site. Thus, in organizational cases, an employer, unlike Hudgens here, has an ability to curtail the expressive activity by acceding to the union's demands. Furthermore, during unionization campaigns, this Court in *Babcock* and *Central* has granted employees rights superior to those given to nonemployees. Thus, under *Babcock* and *Central* in order to vouchsafe the explicit statutory right of employees to organize themselves into unions, this Court has permitted employees, as opposed to strangers, to solicit for union membership on their employer's property regardless of the availability of alternative public forums.[12] This Court has recognized that when employees are on their employer's property in connection with their job duties, private property rights are not at stake. Therefore, the rights to be accommodated include only the right of organization and the employer's right to insure discipline, safety and production, with the former right generally prevailing.[13]

However, even in the organizational context this Court has not abandoned concern for property rights. Rather, this Court has decreed that unlike employees, nonemployee union organizers who come onto private property to solicit for union membership or to advertise the advantages of a union can justify their presence there only if they can demonstrate that this presence has a cogent relationship to the employees' exercise of the guaranteed right to organize. A nonemployee seeking to use private property to organize employees has the *burden of proving* that his audience

12. The guaranteed right of self-organization coupled with the recognition that the employer's property is the place uniquely appropriate for *employees* to freely associate with other employees form a logical basis to accord employees the right to solicit other employees on their employer's property during organizational campaigns; the communication among employees is a threshold concern during an organizing campaign and vital to that campaign's success.

13. *Republic Aviation Co.* v. *N.L.R.B.*, 327 U.S. 793 (1945); *N.L.R.B.* v. *Seamprufe Inc.*, 222 F. 2d 860 (CA 10, 1955).

cannot be reached elsewhere through the use of reasonable efforts. See, *Central Hardware Company* v. *N.L.R.B.*, 468 F. 2d 252 (CA 8, 1972) on remand from this Court. *Babcock* at page 112.[14] Thus, while the Labor Act has assumed that no public forum constitutes a reasonable alternative to the employer's property for *employees* to attempt to unionize other *employees*, in no other situation is this assumption made. In other situations where nonemployees or off-duty employees desire to organize employees, it is instead presumed that reasonable and effective alternatives to private property do exist and may be used to convey messages.[15]

Following the guidance of *Babcock* and *Central*, it is evident that this Court has acknowledged that the long standing and constitutionally protected rights of private property should not lightly give way even to organizational activity directly related to the use of the property. (*Central* at 544-6.) It follows that property rights should be more stringently guarded in situations such as the instant case when the purpose of the expressive activity is but indirectly related to the use of the property. That is, since the users of the private property to be subjected to protest activity *not directly* related to the property's purpose

14. Furthermore, it has been held that employees while off duty enjoy only the access rights to private property that are granted to strangers. *GTE Lenkurt, Inc.*, 204 NLRB No. 74 (1973); *N.L.R.B.* v. *Great Atlantic & Pacific Tea Co.*, 277 F. 2d 759 (CA 5, 1960); *Diamond Shamrock Co.* v. *N.L.R.B.*, 443 F. 2d 52 (CA 3, 1971). These holdings demonstrate that the interests to be balanced differ, depending upon whether on or off duty employees are involved. Thus, while the presence of on duty employees on their employer's property does not bring private property rights into focus, when off duty employees seek admission to private property for the sole purpose of soliciting union support, property rights are directly put in issue, just as these rights are at issue when nonemployees seek admission for a similar purpose. It is logical that both off duty employees and nonemployees should be considered invitees to the same extent and entitled to identical admission rights to private property when they seek to employ this property for the purpose of unionizing.

15. In nonorganizational situations such as the instant case this presumption is made where employees or nonemployees desire to engage in expressive activity that is at least indirectly related to the property's business purpose. (*Logan-Lloyd* test, *supra.*)

have no control over the duration or scope of this activity (except by excluding the protesters) there should be no occasion to open this property to such activity absent a conclusive demonstration of a compeling need due to the lack of alternative public forums.

An analysis of the record below utilizing the criteria here proposed compels the conclusion that the strikers have not succeeded in meeting their burden to demonstrate the unavailability of effective alternative public forums and were properly excluded from Hudgens' center.[16] These strikers sought to reach with their message the large segment of the public who at sometime would purchase the products which were sold by Butler and his competitors. This conclusion is buttressed by the breadth and purpose of the picketing itself. The strikers picketed (or attempted to picket) each of their employer's ten locations including all of his retail outlets in the metropolitan Atlanta area. Their evident intent was to persuade the public, who at some occasion would require shoes and related products, to purchase these products from others, rather than from their employer and so bring economic pressure to bear upon their employer; he would then be forced to yield to their union's bargaining position.

Once it is accepted that the purchasing public was the target of the pickets, alternatives to the center's private property become readily apparent. Some of these alternatives include newspapers, radio and television.[17] These media are utilized to

16. As stated, the Chamber believes that the standard here proposed reflects the variables present in the instant case. However, the Chamber also contends that even under what it believes to be the more lenient *Babcock* principles, Hudgens properly excluded the strikers from its private property since pursuant to *Babcock's* directives they did not satisfactorily demonstrate the absence of alternative public forums.

17. In the 1974 strike conducted by the Amalgamated Clothing Workers of America against Farah Manufacturing Company, the union in a nationwide campaign, discussed *infra*, engaged in extensive mass media advertising in an effort to encourage the general public to cease buying Farah products sold by retailers.

As an indication of means which other unions have success-

encourage patronage at the Hudgen's center and could as effectively be employed to discourage patronage. Indeed, the record reveals that the use of such media would be less expensive than the cost of maintaining pickets at Butler's nine retail outlets. The record also discloses that the time spent picketing could have been more effectively utilized by advertising on mass media.

3. Property Rights Must Be Guarded from the Intimidatory Effects of Picketing When the Purpose of This Activity Is Indirectly Related to the Business of the Property.

This Court has recognized the intimidatory effect of picketing. Thus, this Court has observed that picketing, unlike other modes of persuasion, has the propensity to implicate the public and to persuade it to refrain from entering into advantageous relations with the business establishments that are involved—however indirectly—in the dispute. In the words of the Court,

> "But while picketing is a mode of communication it is inseparably something more and different. Industrial picketing 'is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite

fully employed in analogous situations, with only slight exercise of diligence and ingenuity, we refer this Court to a study made in 1967 of the activities of the Retail Clerks Union, as revealed in editions of its magazine, "The Retail Clerk's Advocate." Not all such devices or alternatives would be appropriate in this or any case, but they reveal what can be achieved by a union which is willing to accept its duty. These alternatives included, for example, a consumer boycott involving the use of balloons and bumper stickers (June, 1967, page 3); announcements on national television (July, 1967, page 18), at state and county fairs, holiday celebrations and other festivals (October, 1967, page 12); extensive distribution of shopping bags with imprinted messages which recipients would tend to retain more than handbills (June, 1967, page 5 and October, 1967, page 12); outdoor billboards (July, 1967, page 14); sponsorship of local radio and television programs (October, 1967, page 12 and April, 1967, page 16); sponsorship of local sports teams (October, 1967, page 28); union industry exhibits (July, 1967, page 14); and a caravan of automobiles with signs inviting spectators' attention (January, 1967, page 28).

> irrespective of the nature of the ideas which are being disseminated.' Mr. Justice Douglas, joined by Black and Murphy, JJ, concurring in *Bakery & Pastry Drivers & Helpers Local* v. *Wohl*, 315 U.S. 769, 775, 776. Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word." *Hughes* v. *Superior Court*, 339 U.S. 460, at 464-5 (1950).[18]

It is evident that private property rights must be shielded from picketing especially when, as here, the picketing has no direct relationship with the business of the shopping center. The standard suggested by the Chamber will accomplish this purpose while simultaneously affording due regard to the expressive needs of others. Indeed, it is this standard that recognizes the rights of shopping center users—owners and tenants—to conduct their business free from trespass and without interference from those who would use private property to protest or propagandize. That is, the Chamber's suggested standard will, in most instances, prevent the owner and tenants of private property from becoming entangled in the effects of picketing designed to support disputes over which they have no control, since these disputes do not originate on the owner's property or concern the labor relations at that property of any facility. Conversely, if a lesser standard than that suggested by the Chamber is employed to balance property and picketing rights, private property will become a battleground for pickets to utilize to espouse their many campaigns which are not directly related to the property's business, with scant regard for the availability of alterative public forums or other effective communication techniques.

18. See, in addition, Teller, *Picketing and Free Speech*, 56 Harv. L. Rev. 180, 200-02 (1942); Dodd, *Picketing and Free Speech: A Dissent*, 56 Harv. L. Rev. 513, 517 (1943).

The Court below failed to accept the Chamber's position, expressing instead the fear that retail chains could locate their outlets in shopping centers and prevent direct *picket* contact with customers at all stores except that where the dispute originated. However, the court below in reaching this conclusion failed to consider that effective alternatives to picketing to communicate with the consumer public do exist and, in addition, failed to take cognizance of the intimidatory effect of picketing.

As an example of this effect, recently the Amalgamated Clothing Workers of America, AFL-CIO, and other labor organizations engaged in a nationwide outburst of picketing on private property devoted to retail selling in support of a strike against one nonretail establishment, Farah Manufacturing Co. Farah manufactured clothing sold at the picketed retail establishments. While the picketing arguably was in compliance with this Court's *Tree Fruits doctrine* (337 U.S. 58, 1964), the union's clear and admitted secondary objective was to compel the neutral retailers selling merchandise manufactured by Farah to cease doing business with that company with whom the union had its primary dispute. The target of the union was the nation's consuming public. The labor dispute did not originate on the retail property picketed and did not concern the labor relations of any facility on that property. Had the standards suggested here by the Chamber been then adopted, in many, if not all, instances the pickets would have been compelled to utilize alternative avenues of communication, since it is patent that they could not demonstrate that direct picketing on private property was their only effective means to reach their large intended audience.

Here, then, and in Farah the deleterious effect to private property caused by consumer picketing far outweighs the necessity to utilize this property for this protest activity. Accordingly, this Court should require strict and compelling proof by the unions that alternative forums are unavailable before requiring private property to open to consumer picketing, particularly where the underlying labor dispute did not originate on this property.

The test suggested here by the Chamber balances the competing rights of property and communication giving due regard to each; the Chamber urges that this test be adopted by this Court to apply to situations where the purpose of the protest activity is not directly related to business of the private property.

CONCLUSION.

For all the foregoing reasons and those expressed by the Petitioner, the Chamber urges that the judgment of the Court of Appeals be reversed and this case be remanded to that court with instructions to deny enforcement of the Board's order.

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